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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

PERFECT 10, INC., a California corporation,

Plaintiff,
v.

RAPIDSHARE A.G., a corporation;
CHRISTIAN SCHMID; BOBBY
CHANG; and DOES 1 through 100,
inclusive.

Defendants.

| Case No.: CV 09-2596 H WMc

**PLAINTIFF PERFECT 10, INC.'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
DEFENDANT RAPIDSHARE'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT ON PERFECT 10'S
FIFTH AND SIXTH CLAIMS FOR
RELIEF**

[DECLARATIONS OF SEAN CHUMURA, DR. NORMAN ZADA, AND ERIC J. BENINK, RESPONSE TO SEPARATE STATEMENT OF MATERIAL FACTS, AND EVIDENTIARY OBJECTIONS SUBMITTED CONCURRENTLY HEREWITH]

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5 **Rules**

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I. INTRODUCTION AND SUMMARY OF ARGUMENT.

Before discovery has even commenced in this action, Defendant RapidShare A.G. (“RapidShare”) has moved for partial summary judgment on two of Plaintiff Perfect 10, Inc.’s (“Perfect 10”) eight claims for relief. RapidShare incorrectly asserts that Perfect 10’s fifth claim for violation of California’s unfair competition law, Cal. Bus. & Prof. Code §§ 17200 *et seq.* (the “UCL”), and its sixth claim for violation of Perfect 10’s rights of publicity are preempted by Section 230(c)(1) of the Communications Decency Act (the “CDA”), 47 U.S.C. § 230(c)(1) (“Section 230”) and that Perfect 10’s UCL claim is also preempted by the Copyright Act.

RapidShare’s summary judgment motion (the “Motion”) is based primarily on the unsupported, self-serving, and misleading claim of its founder, Christian Schmid (“Schmid”), that “all of the files, which are stored on RapidShare’s website, have been stored by users and not RapidShare itself.”¹ Schmid does not state that RapidShare has never *uploaded* files itself to RapidShare’s servers. Moreover, Schmid never explains: (i) how RapidShare was able to start its business without uploading any files itself; or (ii) how RapidShare was able to persuade third parties to upload thousands of terabytes of pirated content to RapidShare servers.

RapidShare concedes that if it uploaded files to RapidShare’s servers, its Motion must then be denied. *See* Memorandum of Points and Authorities in support of the Motion (“Memo”) at 1:7-10, 1:13-14. Perfect 10 has not yet had the opportunity to conduct any discovery, either to challenge Schmid’s baseless claim or to determine why the International Anti-Piracy Caucus of the United States Congress recently identified RapidShare as one of the six worst pirate websites in the world. Moreover,

¹ See Declaration of Christian Schmid in support of the Motion, dated June 11, 2010 (“Schmid Decl.”), attached as Exhibit 7 to the Declaration of Lori Chang in support of the Motion (Docket No. 79-3), ¶2. Schmid provides no support whatsoever for this assertion. The inadmissibility of Schmid’s statement is discussed in greater detail in Perfect 10’s Evidentiary Objections, submitted concurrently herewith. As explained in Section III.B, below, if this Court determines that Schmid’s statement is inadmissible, it should deny the Motion for this reason alone.

1 even without such discovery, Perfect 10 has submitted sufficient evidence to create
 2 genuine issues of material fact regarding immunity under the CDA and preemption
 3 under the Copyright Act so as to compel the denial of the Motion.

4 **A. RapidShare Is Not Entitled To Immunity Under The CDA.**

5 RapidShare engages in various activities which are not immunized by the CDA.
 6 The evidence submitted by Perfect 10 establishes that RapidShare: (i) stores content;
 7 (ii) creates content; (iii) uploads content itself, (iv) pays third parties to upload content;
 8 and (v) sells content. Of these five activities, only the passive storage of content is
 9 potentially immunized by the CDA.

10 The CDA only immunizes an interactive computer service from a claim in which
 11 the plaintiff seeks to treat the service as a publisher or speaker of content created by
 12 third parties. It states that “[n]o provider . . . of an interactive computer service shall
 13 be treated as the publisher or speaker of any information provided by another
 14 information content provider.” 47 U.S.C. §230(c)(1). The CDA has been primarily
 15 applied to protect passive websites and bulletin boards from defamation claims arising
 16 from defamatory comments posted by users. *See, e.g., Barnes v. Yahoo!, Inc.*, 570
 17 F.3d 1096, 1101 (9th Cir. 2009).

18 If a website such as RapidShare does not act in a completely passive way, and
 19 instead is involved in the creation or development of the information that is provided,
 20 the website is deemed to be also functioning as an “information content provider” and
 21 is thus not entitled to CDA immunity. The statute defines “information content
 22 provider” as “any person or entity that is responsible, in whole or *in part*, for the
 23 creation or development of information provided through the Internet or any other
 24 interactive computer service.” 47 U.S.C. §230(f)(3) (emphasis added). Accordingly, a
 25 website is not entitled to CDA immunity for *any* information it is responsible for
 26 creating or developing, even in part. Furthermore, the Ninth Circuit has held that a
 27 website is responsible for the “development” of unlawful content, and thus not entitled
 28 to CDA immunity, “if it contributes materially to the alleged illegality of the conduct.”

1 *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d
 2 1157, 1167-68 (9th Cir. 2008) (*en banc*) (“*Roommates*”).

3 As explained below, RapidShare is acting as an “information content provider”
 4 when it uploads, creates, pays for, and sells infringing material. Accordingly,
 5 RapidShare is not entitled to CDA immunity for these activities.

6 **1. RapidShare Uploads And Creates Infringing Content.**

7 The Declaration of Sean Chumura, submitted concurrently herewith (the
 8 “Chumura Decl.”) at the very least creates a genuine issue of material fact regarding
 9 the key issue underlying the Motion – whether the files on RapidShare’s servers were
 10 uploaded solely by third parties. The Chumura Declaration establishes that
 11 RapidShare creates additional copies of infringing works both when its users upload
 12 those works to its servers and when it distributes copies of those works to its users
 13 during the downloading process, and that RapidShare creates its own thumbnail images
 14 of infringing works. Chumura Decl. ¶¶4-6, Exh. 1; *see also* Declaration of Dr.
 15 Norman Zada, submitted concurrently herewith (“Zada Decl.”), ¶¶12, 22, Exhs. 10, 20.
 16 RapidShare’s creation and distribution of thousands of copies of these works is the act
 17 of an information content provider that is not immunized by the CDA [*see* Sections
 18 II.F and IV.A, below].

19 In addition, as discussed on its own website, RapidShare offers a “remote
 20 upload” tool which RapidShare itself uses to access password-protected websites and
 21 upload infringing material from those websites directly onto RapidShare’s servers. In
 22 this process, the infringing material never passes through a user’s computer.

23 RapidShare’s use of the “remote upload” tool does not qualify for CDA immunity,
 24 because it is RapidShare’s own act and not the passive publishing of content generated
 25 by third parties. In fact, no RapidShare user could legally authorize RapidShare to
 26 enter a third-party’s password-protected website, upload material from that website,
 27 and then distribute that material to RapidShare users. Such activity is forbidden by the
 28 terms and conditions of password-protected websites, including RapidShare.com.

1 Chumura Decl. ¶¶4-7; Exhs. 1-2; Zada Decl. ¶¶11-12, Exhs. 9-10. Accordingly,
 2 merely because a user gives it “permission,” RapidShare may not lawfully enter a
 3 website such as fox.com, upload every movie from that website, and then distribute
 4 those movies to other RapidShare users. For this reason as well, Rapidshare is not
 5 entitled to CDA immunity [*see* Sections II.C and IV.A, below].

6 **2. RapidShare Pays For The Uploading Of Infringing Content.**

7 RapidShare is responsible for the creation or development of infringing content
 8 because it has operated an affiliate program, under which RapidShare paid users to
 9 upload infringing material. Although RapidShare now asserts that this program has
 10 been suspended, the program unquestionably was in effect at least through January
 11 2010, the period at issue in this action. Moreover, both RapidShare’s website and
 12 third-party websites continue to state that RapidShare is offering such payments, as
 13 well as other incentives to members to upload content. Zada Decl. ¶¶18-20, Exhs. 16-
 14 18. RapidShare’s payments constitute a material contribution to allegedly illegal
 15 conduct, which precludes CDA immunity [*see* Sections II.D and IV.A, below].

16 **3. The CDA Does Not Immunize The Sale Of Infringing Content.**

17 The CDA only immunizes websites such as RapidShare from being treated as
 18 publishers or speakers of information posted by third parties. It does not immunize
 19 RapidShare’s sale of access to intellectual property that it does not own. Just because a
 20 RapidShare user stores the movie “Titanic” in a RapidShare file does not mean that
 21 RapidShare is authorized to make copies of “Titanic” and distribute “Titanic” to other
 22 RapidShare members without paying the rightful owners. RapidShare’s offering its
 23 members the ability to download billions of dollars of intellectual property for only
 24 \$10 per month, including images that violate Perfect 10’s right of publicity – the
 25 conduct underlying Perfect 10’s UCL and right of publicity claims – is simply not the
 26 passive act of a speaker or publisher protected by the CDA [*see* Section IV.B, below].

1 **4. The CDA Was Not Designed To Protect Those Who Make And**
 2 **Distribute Thousands Of Copies Of Pornographic Works.**

3 CDA immunity must be considered in light of the statute's purpose and title.
 4 Section 230(c) is titled "Protection for 'good samaritan' blocking and screening of
 5 offensive material." The Ninth Circuit has explained that "the substance of section
 6 230(c) can and should be interpreted consistent with its caption." *Roommates*, 521
 7 F.3d at 1164. RapidShare, however, offers its members access to at least 375,000 files
 8 containing or associated with the term "porn," and at least 2,500 files containing or
 9 associated with the term "Lolita." Zada Decl. ¶¶21-22, Exhs. 19-20. RapidShare has
 10 created a website which offers massive amounts of pornography by paying people to
 11 upload such files. Such conduct is the antithesis of good samaritan blocking and
 12 screening of offensive material immunized by the CDA [see Section II.G and IV.D,
 13 below].

14 **B. Perfect 10's UCL Claim Is Not Preempted By The Copyright Act.**

15 RapidShare also asserts that Perfect 10's UCL claim is preempted by the
 16 Copyright Act because it is premised on copying. RapidShare is wrong, for at least
 17 two reasons. First, Perfect 10's UCL claim alleges, in part, that RapidShare is
 18 engaging in unlawful conduct because it is violating trademark law and rights of
 19 publicity. These distinct claims are qualitatively different from, and not preempted by,
 20 the Copyright Act. Second, Perfect 10's UCL claim is premised on the fact that
 21 RapidShare is unfairly competing with Perfect 10 through the theft and sale of
 22 intellectual property belonging to *third parties*. These elements of wrongdoing are in
 23 addition to, and qualitatively different from, the elements of Perfect 10's copyright
 24 infringement claim, which alleges that RapidShare has infringed *Perfect 10's own*
 25 *copyrights*. For each of these reasons, RapidShare's assertion that the UCL claim is
 26 preempted by the Copyright Act fails [see Section V, below].

1 **C. At The Very Least, Perfect 10 Is Entitled To Conduct Discovery To**
 2 **Oppose The Motion Under Rule 56(f).**

3 Even if this Court determines that Perfect 10 has not established a genuine issue
 4 of material fact sufficient to deny the Motion (and it should not, for all of the reasons
 5 discussed herein) the Court still cannot properly grant the Motion. Here, RapidShare
 6 filed the Motion without allowing Perfect 10 the opportunity to conduct any discovery.
 7 The Declaration of Eric J. Benink, submitted herewith, establishes that Perfect 10 has
 8 the right to take discovery on critical issues relevant to the Motion, pursuant to Fed. R.
 9 Civ. P. 56(f). These issues include (without limitation): (i) whether RapidShare itself
 10 has uploaded any material to its servers; (ii) how the 12,000 terabytes of movies,
 11 songs, and other allegedly pirated materials were uploaded to RapidShare's servers;
 12 (iii) the creation and development of RapidShare's affiliate program; (iv) RapidShare's
 13 business dealings with other infringing websites and uploaders; and (v) why the
 14 Congressional International Anti-Piracy Caucus and the Recording Industry
 15 Association of America consider RapidShare to be one of the six worst pirate websites
 16 in the world. Accordingly, at the very least, this Court should deny or stay the Motion
 17 pursuant to Fed. R. Civ. P. 56(f), to allow Perfect 10 to conduct the necessary
 18 discovery [*see* Section VI, below].

19 **II. RELEVANT FACTUAL BACKGROUND.**

20 **A. RapidShare Does Much More Than Merely Store Content.**

21 RapidShare operates one of the world's busiest websites. Declaration of
 22 Christian Schmid, filed June 16, 2010 (Docket No. 83-2, Ex. B), ¶4. It hosts 400
 23 million files containing 12,000 terabytes of intellectual property, and has more than 50
 24 million active users. *Id.* Assuming that half of its users pay the monthly fee of
 25 approximately \$10, RapidShare's revenues are at least **\$3 billion per year.**

26 RapidShare's immense revenues from the sale of content it does not own,
 27 demonstrate~~s~~ the significant level of unfair competition faced by Perfect 10 and other

1 copyright holders who pay for their content, while RapidShare does not.²

2 Although RapidShare refers to itself as a “storage locker” or a “cloud computing
 3 service” [see, e.g., Memo at 2 n.2], RapidShare’s business has not grown to
 4 astronomical proportions because people are eager to “store” the files on RapidShare’s
 5 servers. (The company is not called “RapidStore.”) Rather, RapidShare owes its
 6 enormous success to all of its non-storage activities, in which it exploits and sells the
 7 intellectual property of others. RapidShare provides users with access to 12,000
 8 terabytes of pirated materials found on its servers – a cyberspace black market where
 9 billions of dollars in movies, songs, videos, software, and images can be downloaded
 10 in exchange for a membership fee of approximately \$10 per month.

11 RapidShare’s own terms and conditions make clear that it is not a true storage
 12 locker. First, RapidShare automatically deletes all files larger than 50 gigabytes that
 13 have not been downloaded in sixty days. Second, RapidShare does not allow a user to
 14 download more than 25 gigabytes of files on any one day. Third, RapidShare reserves
 15 the right to delete all of the files uploaded by a user without any notice whatsoever!
 16 Each one of these terms and conditions is contrary to what one would expect from a
 17 bona fide storage locker. Chumura Decl. ¶8, Exh. 2.

18 Moreover, as explained below, RapidShare does not merely store content.
 19 RapidShare also makes unauthorized copies of movies, songs, images, and computer
 20 software, and distributes such materials to its millions of users, without paying the
 21 owners of those works. Furthermore, RapidShare uploads infringing materials itself
 22 using its remote upload tool, pays others to upload such materials through its affiliate
 23 program, and makes derivative copies of works which it uses to create its RapidShare
 24 link lists. Chumura Decl. ¶¶4-6, 9-13, Exhs. 1, 3-4; Zada Decl. ¶¶12-22, Exhs. 10-20.

25 ² Perfect 10 previously believed that RapidShare earned approximately \$80
 26 million a year. Mr. Schmid’s recent declaration shows that the actual figure is closer to
 27 \$3 billion a year. Most of this money belongs to the rightful owners of the content that
 28 RapidShare sells without permission, and explains why the International Anti-Piracy
 Caucus has determined RapidShare to be one of the six worst pirate websites in the
 world.

1 Such conduct is not the legitimate function of a storage locker and is not immunized by
 2 the CDA.

3 **B. RapidShare Has Been Identified By The United States Congress As
 4 One Of The Worst Pirate Websites In The World.**

5 On May 19, 2010, the International Anti-Piracy Caucus of the United States
 6 Congress, a caucus made up of 70 members of Congress and chaired by Senators
 7 Orrin Hatch (R-Utah) and Sheldon Whitehouse (D-RI) and Congressmen Bob
 8 Goodlatte (R-Va.) and Adam Schiff (D-Cal.), issued its 2010 International Piracy
 9 Watch List (the “Congressional Anti-Piracy Report”). *The Congressional Anti-*
 10 *Piracy Report identifies RapidShare as one of the six worst pirate websites in the*
 11 *world.* At a press conference discussing the issuance of the report, Senator
 12 Whitehouse stated that “[t]he United States has been on the losing end of the
 13 largest theft of intellectual property in history. This must be stopped, and soon.”
 14 Congressman Schiff added that “[t]o ensure the continued creation and distribution
 15 of music, movies, software, and books, from which we all benefit, we must ensure
 16 that our artists, creators and producers *are paid for their work.*” Zada Decl. ¶4,
 17 Exh. 2 (emphasis added). In a press release discussing the report, the Recording
 18 Industry Association of America (the “RIAA”) stated that RapidShare was one of
 19 the “leading sources of illegal music and operate[s] with the clear purpose of
 20 encouraging and inducing theft.” The RIAA added that RapidShare “brazenly
 21 traffic[s] in copyright theft,” is “overwhelmingly used for the global exchange of
 22 illegal movies, music, and other copyrighted works,” and “*undercut[s] the ability of*
 23 *legitimate services to compete and thrive in the global marketplace...*” Zada Decl.
 24 ¶4, Exh. 2 (emphasis added)..

25 Others have described RapidShare in a similar way. For example, on February
 26 24, 2010, six book publishers, including McGraw-Hill and John Wiley & Sons,
 27 obtained an injunction in Germany against RapidShare. In a press release
 28 accompanying this ruling, the publishers stated, “Companies like RapidShare derive

1 substantial profit by facilitating the theft of the work of others, adding no value to the
 2 creative process and providing no compensation to the creators.” *Id.*

3 **C. RapidShare Enters Password Protected Websites And Uploads
 4 Material Itself.**

5 RapidShare bases its Motion almost entirely upon its contention that only its
 6 users, and not RapidShare, upload files to RapidShare’s servers. It is undisputed,
 7 however, that RapidShare has created a “remote-upload” tool under which RapidShare
 8 itself enters password-protected websites such as perfect10.com, playboy.com, or
 9 fox.com, and uploads material from those websites to RapidShare’s servers. Zada
 10 Decl. ¶¶11-12, Exhs. 9-10; Chumura Decl. ¶¶4-7, Exhs. 1-2. When it uses this
 11 “remote-upload” tool, RapidShare itself uploads files onto its servers, **without those**
 12 **files ever being transmitted through the user’s computer.** As RapidShare’s website
 13 explains:

14 **What are remote-uploads and how can I start them?**

15 By using remote-uploads, *we will download the file for you and*
 16 *upload it automatically to RapidShare.* In your premium-zone you click
 17 on “Remote-Upserts” and add your ULRs there. We will then download
 the file for you and re-upload it in your premium zone.

18 ***

19 **Can I use remote-uploads with authentication as well?**

20 Yes, that’s [sic] possible. Just use
 21 <http://LOGIN:PASSWORD@www.server.com/file.zip> and replace
 LOGIN with your login on that server and PASSWORD with your
 password there. We will login on that server with that data then.

23 Zada Decl. ¶12, Exh. 10, page 1 (emphasis added).

24 Password protected websites have terms and conditions which forbid their users
 25 from giving out their passwords to others or allowing others to make copies of works
 26 from those websites. Thus, RapidShare’s use of its remote-upload tool to enter third-
 27 party, password-protected websites is strictly forbidden by these websites. Zada Decl.
 28 ¶11, Exh. 9; Chumura Decl. ¶7, Exh. 2. Accordingly, when RapidShare created its

1 remote-upload tool, RapidShare knew that this tool could only be used for illegal
 2 purposes. RapidShare knows both that it cannot legally enter password-protected
 3 websites using someone else's username and password (even with that user's
 4 permission) and that none of the material uploaded to RapidShare's servers using its
 5 remote-upload tool may be legally copied, offered for sale, or otherwise distributed.
 6 Zada Decl. ¶11, Exh. 9 Nevertheless, RapidShare has engaged in exactly those acts.

7 **D. RapidShare Has Paid Users To Upload Content To RapidShare's
 8 Servers.**

9 It is undisputed that RapidShare has operated an affiliate program in which
 10 RapidShare pays its members when they refer traffic to RapidShare's website and
 11 when other RapidShare members download files that these members have uploaded to
 12 RapidShare's servers. *See Order Denying Plaintiff's Motion for Preliminary
 13 Injunction*, dated May 18, 2010 (Docket No. 71) ("PI Order") at 10:1-6. This program
 14 encouraged RapidShare members to upload copyrighted files that would be frequently
 15 downloaded, such as full length movies, songs by major recording artists, and
 16 pornography. As this Court has noted [*see* PI Order at 10:11-15]:

17 The goal of RapidShare's program was, and still is, to reward
 18 users for distributing and reproducing (through uploading and
 19 downloading) material, even if that material is infringing. Whether the
 20 program rewards users with money, merchandise, or charitable
 21 donations, it encourages users to upload and download potentially
 22 infringing material.

23 Although RapidShare claims that it has stopped offering cash to RapidShare's
 24 users as part of its affiliate program, RapidShare's website still contains web pages that
 25 offer such cash promotions. Zada Decl. ¶20, Exh. 18. Furthermore, such cash
 26 promotions still appear on third party websites, which advertise that a RapidShare user
 27 may "[e]arn up to 20 Euro for gaining us a new customer," or "[u]pload files and [e]arn
 28 money from RapidShare." Such promotions may be found on at least 4,380 web pages

1 on sites where infringing materials are normally posted. The size of some of these
 2 RapidShare promotions, which often cover several pages of these websites, and the
 3 way these promotions are presented, strongly suggest that a commercial relationship
 4 exists between RapidShare and these infringing websites, which may even be owned or
 5 controlled by RapidShare. Zada Decl. ¶18, Exh. 16; Chumura Decl. ¶13, Exh. 4.

6 **E. RapidShare Has Not Identified The Purported Third Parties That
 7 Allegedly Uploaded P10 Images To RapidShare's Servers.**

8 As noted above, the Motion is based almost entirely upon Schmid's assertion
 9 that all of the files currently found on RapidShare's servers have been stored by third
 10 parties. Schmid Decl. ¶2. RapidShare has failed to provide Perfect 10 with any
 11 evidence to support this assertion. Moreover, RapidShare has never submitted
 12 declarations demonstrating that RapidShare never uploaded files to RapidShare servers
 13 itself, even though RapidShare most likely engaged in such uploading when it first
 14 started. Chumura Decl. ¶14.

15 Perfect 10 has sent six DMCA notices to RapidShare. These notices identified
 16 more than 2,200 RapidShare files which have offered at least 110,000 copies of
 17 copyrighted Perfect 10 Images ("P10 Images") to RapidShare users. In those notices,
 18 Perfect 10 asked RapidShare to identify the third parties that uploaded those P10
 19 Images to its servers. RapidShare has refused to do so. Zada Decl. ¶5, Exh. 3.

20 **F. RapidShare Is Substantially Involved In Every Aspect Of The Illegal
 21 Activity.**

22 Perfect 10 has submitted evidence in opposition to the Motion, which was
 23 not previously before the Court,³ which establishes that RapidShare is substantially

24
 25 ³ The Chumura and Zada Declarations contain significant evidence that was not
 26 previously before this Court. Indeed, the PI Order states only that Perfect 10 "failed to
 27 present a *prima facie* case of direct infringement against RapidShare *based on the*
 28 *present record before the Court.*" PI Order at 6:15-16 (emphasis added). Although not
 directly relevant to the issues raised by this Motion, the evidence submitted by Perfect
 10 in opposition to the Motion, described in Section II, above, is more than sufficient
 for the Court to change its conclusion regarding the issue of direct infringement.

1 involved in every aspect of the illegal activity. In addition to accessing password-
 2 protected websites [*see* Section II.C, above] and paying users to upload unauthorized
 3 material [*see* Section II.D, above], RapidShare has also made copies of the infringing
 4 material, stored that material on its servers, displayed the infringing material, and sold
 5 access to it, including to third party websites for resale. Chumura Decl. ¶¶4-10, Exhs.
 6 1-2; Zada Decl. ¶¶12-17, Exhs. 10-15. As explained below, RapidShare has engaged
 7 in the following unlawful conduct:

8 **1. RapidShare Has Displayed P10 Images.**

9 RapidShare has publicly displayed P10 Images and other images on its
 10 website. Chumura Decl. Exh. 1, pages 8-9; Zada Decl. ¶¶12, 17, 22, Exhs. 10, 15,
 11 20.⁴ RapidShare's assertion that "files are not publicly displayed on its site" [*see*
 12 Separate Statement of Material Facts (Docket No. 79-2) at 1:27-28] is simply
 13 incorrect.

14 **2. RapidShare Creates Copies Of P10 Images When Its Users
 15 Both Upload And Download Files.**

16 As explained in greater detail in the Chumura Declaration, RapidShare
 17 creates copies of P10 Images both when users upload these images to RapidShare's
 18 servers and when users download these images from RapidShare's servers. Before
 19 a user uploads a P10 Image, a copy of that image is located only on the user's
 20 computer. When that user uploads the P10 Image, RapidShare makes an additional
 21 copy of that image and stores the P10 Image on its servers. Similarly, at the time a
 22 user seeks to download a P10 Image from RapidShare, a copy of that image is
 23 located on RapidShare's servers. When the user starts the downloading process,
 24 RapidShare causes an extra copy of the P10 Image to be made and offered to the
 25 user. At the conclusion of the downloading process, there are two copies of the
 26 P10 Image – one located on RapidShare's servers and one in the user's computer.

27

⁴ Although not directly relevant to the Motion, such conduct violates Perfect 10's
 28 exclusive right to display its copyrighted works publicly. *See* 17 U.S.C. §106(5).

1 During both the uploading and downloading process, RapidShare causes additional
 2 copies of P10 Images to be made, in violation of Perfect 10's exclusive
 3 reproduction rights. Chumura Decl. ¶¶4-6, Exh. 1; Zada Decl. ¶12, Exh. 10. *See*
 4 17 U.S.C. §106(1).

5 **3. RapidShare Creates Link Lists Which Include Thumbnails
 6 Created By RapidShare.**

7 RapidShare creates "link lists" which allow users to view lists of images
 8 located on RapidShare's servers. As part of these "link lists," RapidShare makes
 9 thumbnail copies of the images that were uploaded by the RapidShare user. When
 10 a RapidShare user clicks on one of these thumbnails, a full-size image from
 11 RapidShare's servers is displayed on the user's computer. Chumura Decl. ¶¶4-6,
 12 Exh. 1; Zada Decl. ¶12, Exh. 10.

13 **4. RapidShare Makes Its Content Available To Third Party
 14 Websites For Resale.**

15 RapidShare is currently making the content on its servers available to at least
 16 three websites – downloadnow.net, mydownloader.com, and zevera.com – for
 17 distribution and sale by these websites to their members. Members of these websites
 18 can pay a fee which allows them to access RapidShare and download any files they
 19 want from RapidShare's servers. Zada Decl. ¶¶13-15, Exhs. 11-13. RapidShare also
 20 apparently accepts uploaded files from third party websites that simultaneously upload
 21 to multiple file hosts. Zada Decl. ¶16, Exh. 14. Such activities defy the notion that
 22 RapidShare is acting as a storage locker. Users that simultaneously upload to multiple
 23 file hosts are not storing information. Instead, they are seeking to gain greater revenue
 24 by being paid by multiple file hosts for their infringing content.

25 **G. RapidShare Offers Massive Amounts Of Explicit Pornography.**

26 RapidShare has gone out of its way to wrongly describe Perfect 10 as a
 27 pornography company. Ironically, it is RapidShare that is the massive pornographer.
 28 Perfect 10 has discovered that RapidShare offers its members access to at least 375,000

1 RapidShare files containing the term “porn” and at least 2,500 files containing the
 2 word “Lolita.” Zada Decl. ¶22, Exh. 20. In addition, RapidShare offers files to its
 3 users with disgusting RapidShare file names that are strongly suggestive of child
 4 pornography, some of which are massive in size. RapidShare also displays on its
 5 website, for people of any age to view, extremely distasteful images of celebrity
 6 faces superimposed on the bodies of people engaged in explicit sex. Zada Decl.
 7 ¶¶21-22, Exhs. 19-20.

8 **H. The Allegations Underlying Perfect 10’s UCL And Right Of Publicity
 9 Claims.**

10 In its Fifth Claim for Relief under the UCL, Perfect 10 alleges, among other
 11 things, that RapidShare “has commercially exploited and used millions of
 12 marketable adult-oriented photographs and likenesses,” without authorization or
 13 license. Complaint ¶62. Perfect 10 further alleges that through these photographs,
 14 RapidShare “is unlawfully exploiting the publicity rights and trademark rights of
 15 Perfect 10, as well as the publicity rights, trademark rights, and copyrights of third-
 16 parties.” *Id.* Perfect 10’s UCL claim also alleges as follows:

17 RapidShare is also selling without authorization, in competition
 18 with Perfect 10, billions of dollars in stolen songs, full-length movies,
 19 and even computer software. This conduct enables RapidShare to
 20 compete directly and unfairly with Perfect 10 by, among other things,
 21 offering for free millions of valuable photographs and likenesses, and
 22 thousands of songs, and full length movies, as well as computer
 23 software, that are not lawfully available to Perfect 10 or other
 24 competitors acting lawfully.

25 *Id.* Perfect 10’s UCL claim does not incorporate the allegations regarding
 26 copyright infringement set forth in Perfect 10’s first claim for relief. *Id.* ¶61. In its
 27 Sixth Claim for Relief, Perfect 10 alleges that RapidShare is infringing Perfect 10’s
 28 rights of publicity by: (i) “selling Perfect 10 images for which Perfect 10 has been

1 assigned rights of publicity;” (ii) “selling non-Perfect 10 copyrighted images for
 2 which Perfect 10 has been assigned rights of publicity;”, and (iii) “partnering with
 3 affiliate sites that violate Perfect 10 rights of publicity.” *Id.*, ¶72.

4 **III. RAPIDSHARE HAS FAILED TO SUBMIT SUFFICIENT**
 5 **AFFIRMATIVE ADMISSIBLE EVIDENCE TO OBTAIN SUMMARY**
 6 **JUDGMENT.**

7 **A. Legal Standards Applicable To The Motion.**

8 A moving party may obtain summary judgment only if the pleadings and other
 9 evidence show “that there is no genuine issue as to any material fact and that the
 10 movant is entitled to judgment as a matter of law.” Fed. R. Civ. Proc. 56(c); *Celotex*
 11 *Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment may not be granted “if
 12 the evidence is such that a reasonable jury could return a verdict for the non-moving
 13 party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Moreover, in
 14 determining whether the non-moving party has raised a genuine issue of material fact
 15 sufficient to deny summary judgment, the Court must believe the non-movant and
 16 draw all justifiable inferences in its favor. *Id.* at 255; *Gibson v. County of Washoe*,
 17 *Nev.*, 290 F.3d 1175, 1180 (9th Cir. 2002).

18 RapidShare’s Motion seeks summary judgment that Perfect 10’s UCL and right
 19 of publicity claims are preempted by the CDA and/or the Copyright Act – affirmative
 20 defenses for which RapidShare bears the burden of proof. *See* Defendant RapidShare’s
 21 Answer to Plaintiff’s Complaint (Docket No. 77) at 11:11-16 (alleging in the
 22 Fourteenth Affirmative Defense that Perfect 10’s state law claims are preempted by the
 23 CDA and the Copyright Act); Memo at 3:17-8:2. Accordingly, in order to prevail on
 24 the Motion, RapidShare must produce affirmative admissible evidence establishing all
 25 of the essential elements of these defenses. *See, e.g., Ollier v. Sweetwater Union High*
 26 *School Dist.* 604 F.Supp.2d 1264, 1268 (S.D. Cal. 2009) (“When the moving party
 27 bears the burden of proof on an issue – whether on a claim for relief or an affirmative
 28 defense – the party must establish beyond peradventure all of the essential elements of

1 the claim or defense to warrant judgment in its favor.”) (quotation omitted). As the
 2 Ninth Circuit has explained, “[w]hen the moving party also bears the burden of
 3 persuasion at trial, to prevail on summary judgment it must show that the evidence is
 4 so powerful that no reasonable jury would be free to disbelieve it.” *Shakur v. Schriro*,
 5 514 F.3d 878, 890 (9th Cir. 2008) (quotation omitted).

6 **B. The Schmid Declaration Does Not Constitute Affirmative Admissible
 7 Evidence.**

8 Rule 56(e) requires, among other things, that affidavits submitted in support of a
 9 motion for summary judgment must be made on the personal knowledge of an affiant
 10 who is competent to testify to the matters stated therein and state facts that would be
 11 admissible in evidence. Fed.R.Civ.P. 56(e). Furthermore, a declarant must show
 12 personal knowledge and competency to testify by the facts stated. *Bank Melli Iran v.*
 13 *Pahlavi*, 58 F.3d 1406, 1412 (9th Cir.), *cert. denied*, 516 U.S. 989 (1995). The matters
 14 must be known to the declarant personally, as distinguished from matters of opinion or
 15 hearsay. *Id.* A declarant's mere assertions that he or she possesses personal knowledge
 16 and competency to testify are not sufficient. *Barthelemy v. Air Lines Pilots Ass'n*, 897
 17 F.2d 999 (9th Cir. 1990). “Personal knowledge means that a witness or affiant may
 18 only testify to a fact that can be perceived by the senses and that the witness or affiant
 19 has actually perceived.” *Madsen v. Idaho Emergency Physicians, P.A.*, 2010 WL
 20 1248255 at *3 (D. Idaho, March 23, 2010). Indeed, “[c]onclusory affidavits that do not
 21 affirmatively show personal knowledge of specific facts are insufficient.” *Casey v.*
 22 *Lewis*, 4 F.3d 1516, 1527 (9th Cir. 1993).

23 Here, RapidShare’s Motion is based almost entirely on the statement in the
 24 Schmid Declaration that “[a]ll of the files, which are stored on RapidShare’s website,
 25 have been stored by users and not RapidShare itself.” Schmid Decl. ¶2. Schmid
 26 provides no foundational support whatsoever for this assertion. He fails to provide any
 27 facts demonstrating how or why he personally knows who has uploaded the 400
 28 million files that are located on RapidShare’s servers. He fails to identify any of the

1 individuals who have uploaded the more than 110,000 P10 Images that have been
 2 distributed by RapidShare to its members. In fact, *the entire Schmid Declaration is*
 3 *only two paragraphs long.*

4 In short, the Schmid Declaration is nothing more than a conclusory declaration
 5 that fails to affirmatively show that Schmid has personal knowledge of the specific
 6 facts surrounding the uploading of files onto RapidShare's servers or to identify the
 7 persons or entities who actually uploaded the 12,000 terabytes of content currently
 8 offered by RapidShare. Accordingly, under the authorities cited above, the Schmid
 9 Declaration is "insufficient" to satisfy RapidShare's requirement to submit affirmative
 10 admissible evidence in support of the Motion.

11 **IV. THE EVIDENCE SUBMITTED BY PERFECT 10 ESTABLISHES**
 12 **THAT RAPIDSHARE IS NOT ENTITLED TO CDA IMMUNITY.**

13 Even if this Court determines that the Schmid Declaration constitutes sufficient
 14 affirmative admissible evidence in support of RapidShare's CDA preemption claim
 15 (and it should not, for all of the reasons discussed in Section III, above), this Court still
 16 may not grant the Motion. By its own terms, the CDA only immunizes RapidShare
 17 from claims in which Perfect 10 is seeking to treat it as a "publisher or speaker" of
 18 information provided by third party users. *See* 47 U.S.C. §230(c)(1) ("No provider ...
 19 of an interactive computer service shall be treated as the publisher or speaker of any
 20 information provided by another information content providers"). It does not
 21 immunize RapidShare from claims arising from RapidShare's conduct as an
 22 information content provider, including RapidShare's sale, uploading, and creation of
 23 content – the predominant activity in which RapidShare is engaged. Accordingly, as
 24 explained below, RapidShare is not entitled to immunity under the CDA.

25 **A. Perfect 10 Has Established A Genuine Issue Of Material Fact As To**
 26 **Whether RapidShare Is An Information Content Provider.**

27 The grant of immunity provided under the CDA only applies if RapidShare is
 28 not an "information content provider" which the CDA defines as "any person or entity

1 that is responsible, in whole *or in part*, for the creation or development of' the
 2 offending content. 47 U.S.C. §230(f)(3) (emphasis added.); *Roommates*, 521 F.3d at
 3 1162. Indeed, "a website operator can be both a service provider and a content
 4 provider" and thus "be immune from liability for some of the content it displays to the
 5 public but be subject to liability for other content." *Id.* at 1162-63. The Ninth Circuit
 6 has explained that "the party responsible for putting information online may be subject
 7 to liability, even if the information originated with a user." *Id.* at 1165. Moreover, the
 8 mere fact that the user is physically pushing the button at his or her computer to
 9 transmit information is not determinative. *Id.* at 1166-67 ("The projectionist in the
 10 theatre may push the last button before a film is displayed on the screen, but surely this
 11 doesn't make him the sole producer of the movie."). Furthermore, "the CDA does not
 12 grant immunity for inducing third parties [to engage in illegal conduct.]" *Id.* at 1165.
 13 On the contrary, a website is a developer that does not enjoy immunity under the CDA
 14 if it "***contributes materially to the alleged illegality of the conduct.***" *Id.* at 1168
 15 (emphasis added).

16 Here, Perfect 10 has demonstrated that RapidShare is engaged in the following
 17 activities, all of which involve the creation or development of the offending content:

18 1) RapidShare makes copies of millions of works, both during the process of
 19 uploading and downloading files. Chumura Decl. ¶¶4-6, 9, Exh. 1.

20 2) RapidShare distributes those copies to its users, without any authorization,
 21 and without paying the rightful owners.

22 3) RapidShare enters password-protected websites without authorization, makes
 23 unauthorized copies of material from those websites, uploads those copies to its
 24 servers, and then distributes those copies to its users. Chumura Decl. ¶¶4-7, Exhs. 1-2;
 25 Zada Decl. ¶¶11-12, Exhs. 9-10.

26 4) Through its affiliate program, RapidShare pays users to upload infringing
 27 content to RapidShare servers. Zada Decl. ¶¶18-20, Exhs. 16-18.

28 5) RapidShare creates link lists which contain RapidShare created thumbnails of

1 infringing works. Zada Decl. 12, 22, Exhs. 10, 20; Chumura Decl 4-6, Exh. 1.

2 None of the above activities is immunized by the CDA. At a minimum, the
 3 evidence submitted by Perfect 10 concerning the above RapidShare activities creates a
 4 genuine issue of material fact as to whether RapidShare is acting as an information
 5 content provider sufficient to deny the Motion.

6 **B. Perfect 10 Does Not Seek To Hold RapidShare Liable As A Publisher
 7 Or Speaker.**

8 The Motion fails for the additional reason that Section 230 of the CDA only
 9 protects RapidShare from being treated as a “publisher” or “speaker” of materials
 10 uploaded by a third party. Here, however, Perfect 10 is not seeking to hold RapidShare
 11 liable as a publisher or speaker. Indeed, when RapidShare engages in the conduct
 12 described in Section IV.A, above, including uploading content itself, paying others to
 13 upload content, and selling access to content it does not own, it is not acting as a
 14 speaker, a publisher, or a passive storage locker. Moreover, this very conduct forms
 15 the basis for Perfect 10’s UCL and right of publicity claims – RapidShare’s offering
 16 access to billions of dollars of intellectual property, including images that violate
 17 Perfect 10’s rights of publicity (and for which Perfect 10 does not own the copyright in
 18 many cases), for only a \$10 monthly fee, in competition with Perfect 10. For this
 19 reason as well, RapidShare is not entitled to judgment as a matter of law that these
 20 claims are barred by the CDA.

21 Such a conclusion is compelled by *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th
 22 Cir. 2009), a case cited by RapidShare. *See* Memo at 4:4-7. In *Barnes*, plaintiff sued
 23 defendant Yahoo after Yahoo promised to remove harmful materials about plaintiff
 24 that her ex-boyfriend had posted on a Yahoo website, but failed to do so. *Id.* at 1098-
 25 99. Yahoo argued that plaintiff’s state law claims were preempted by the CDA. *Id.* at
 26 1099. In rejecting Yahoo’s contention that plaintiff’s breach of contract claim under a
 27 theory of promissory estoppel was immunized by the CDA, the Ninth Circuit stressed
 28 that, in applying Section 230(c)(1) of the CDA, courts must determine

1 whether the cause of action inherently requires the court to treat the defendant as the
 2 “publisher or speaker” of content provided by another. To put it another way, courts
 3 must ask whether the duty that the plaintiff alleges the defendant violated derives from
 4 the defendant's status or conduct as a “publisher or speaker.” *Id.* at 1102. Applying
 5 the above language, the Ninth Circuit held that plaintiff “does not seek to hold Yahoo
 6 liable as a publisher or speaker of third-party content, but rather as the counter-party to
 7 a contract, as a promisor who has breached.” *Id.* at 1107. Therefore, the court ruled,
 8 Section 230 of the CDA did not preclude plaintiff's claim.

9 Here, as well, Perfect 10 does not seek to hold RapidShare liable as a publisher
 10 of third party content. Rather, Perfect 10 seeks to hold RapidShare liable as a seller
 11 and as a creator or developer, at least in part, of content. For this reason as well, this
 12 Court should deny the Motion.

13 **C. CCBill Does Not Support The Granting Of The Motion.**

14 RapidShare mistakenly asserts that in *Perfect 10, Inc. v. CCBill, LLC*, 448 F.3d
 15 1102 (9th Cir.), *cert. denied*, 128 S. Ct. 709 (2007), the Ninth Circuit held that “similar
 16 claims for unfair competition and violation of rights of publicity brought by Perfect
 17 10” were barred by the CDA. Memo at 4:8-18. The defendants there were very
 18 different from RapidShare. Defendant CCBill simply acted as a passive processor of
 19 credit cards transactions. It did not store content, make copies, upload material, or pay
 20 others to upload material. Its affiliate, defendant CWIE, provided “connectivity
 21 services” for websites, which included providing them with rackspace and power.
 22 CWIE did not upload content, pay others to upload content, or sell access to content.
 23 RapidShare is vastly more involved in the infringing process and in the creation and
 24 development of offending content than either CCBill or CWIE. *See* Zada Decl. ¶23,
 25 Exh. 21.

26 Moreover, the *CCBill* court held that Perfect 10 had established genuine issues
 27 of material fact as to whether CCBill and CWIE operated a website known as
 28 hornybees.com and as to whether hornybees.com had infringed Perfect 10's copyrights

1 by posting pictures of a Perfect 10 model's body with the head of a celebrity. *CCBill*,
 2 448 F.3d at 1119-20. *Hornybees.com* displayed only third party content, and was
 3 substantially less involved in the alleged infringement than *RapidShare*. *Zada Decl.*
 4 ¶23, Exh. 21. Nevertheless, the *CCBill* court ruled that “[i]f *CCBill* and CWIE operate
 5 *horny-bees.com*, no immunity for infringement on that site is available under either **the**
 6 **DMCA or the CDA.**” *Id.* at 1120 n.6 (emphasis added). For this reason as well,
 7 *CCBill* does not support the granting of the Motion.

8 **D. A Ruling That *RapidShare* Is Entitled To CDA Immunity Is**
 9 **Contrary To The Statute's Caption And Title.**

10 The Ninth Circuit has held that “the substance of section 230(c) can and should
 11 be interpreted consistent with its caption.” *Roommates*, 521 F.3d at 1164. Section
 12 230(c) is titled “Protection for ‘good samaritan’ blocking and screening of offensive
 13 material.” *RapidShare*, however, is not engaging in the “good samaritan blocking and
 14 screening of offensive material. Instead, it is offering its users access to massive
 15 amounts of pornography, which *RapidShare* has failed to screen or block. *Zada Decl.*
 16 ¶¶21-22, Exhs. 19-20. The CDA was designed to protect Good Samaritans that
 17 remove distasteful or offensive content. It was certainly not designed to protect
 18 massive pirate websites like *RapidShare* from claims of unfair competition by law
 19 abiding businesses. For this reason as well, CDA immunity is inapplicable here.

20 **V. THE COPYRIGHT ACT DOES NOT PREEMPT PERFECT 10'S UCL**
 21 **CLAIM.**

22 *RapidShare* mistakenly asserts that Perfect 10's UCL claim is preempted by the
 23 Copyright Act because it is based solely on Perfect 10's copyright infringement claim.
 24 Memo at 7:5-8:2. *RapidShare* is simply incorrect.

25 *Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209 (9th Cir.1998), the case upon
 26 which *RapidShare* relies [see Memo at 7:10-14], specifically holds that a “state law
 27 cause of action is preempted by the Copyright Act” only if “the rights that a plaintiff
 28 asserts under state law [are] ‘rights that are equivalent’ to those protected by the

1 Copyright Act" and the work involved "fall[s] within the "subject matter" of the
 2 Copyright Act as set forth in 17 U.S.C. §§ 102 and 103. *Id.* at 1212. *See also*
 3 *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1003 (9th Cir. 2001).

4 Here, as explained in Section II.H, above, Perfect 10's UCL claim is not
 5 premised on RapidShare's alleged infringement of P10 Images. In fact, the
 6 allegations of copyright infringement found in Perfect 10's first claim for relief are
 7 not incorporated in its UCL claim. *See* Complaint ¶61. Rather, the UCL claim is
 8 premised on the allegation that RapidShare "is unlawfully exploiting the **publicity**
 9 **rights and trademark rights of Perfect 10, as well as the publicity rights,**
 10 **trademark rights, and copyrights of third-parties.**" *Id.* ¶62 (emphasis added).⁵

11 The Ninth Circuit has clearly held that a right of publicity claim is not
 12 preempted by the Copyright Act. *See Downing*, 265 F.3d at 1005 (because the
 13 subject matter of plaintiffs' "right of publicity claims is their names and likenesses,
 14 which are not copyrightable, the claims are not equivalent to the exclusive rights
 15 contained in § 106"); *see also KNB Enterprises v. Matthews*, 78 Cal.App.4th 362,
 16 374-75 (2000) (state law right of publicity claims brought by copyright owner of
 17 erotic photographs which had been displayed without authorization and for profit
 18 by an Internet website were not preempted by the Copyright Act). Furthermore,
 19 Perfect 10's UCL claim is also not preempted by the Copyright Act to the extent it
 20 is based on trademark law. *See Polar Bear Productions, Inc. v. Timex Corp.*, 384
 21 F.3d 700, 721 (9th Cir. 2004) (noting that "[c]opyright and trademark are related
 22 but distinct property rights, evidenced by different federal statutes governing their
 23 protection" and that "[t]he Copyright Act does not preempt related state laws if the
 24 state laws 'protect rights which are qualitatively different from copyright rights').
 25 Finally, the rights asserted by Perfect 10 in connection with its UCL claim are not
 26

27 ⁵ Accordingly, this Court's assertion that "Perfect 10's unfair competition claim rests
 28 on its cause of action for copyright infringement" [PI Order at 13:8-9] is not supported
 by the allegations found in Paragraphs 61 and 62 of the Complaint.

1 “equivalent” to those protected by the Copyright Act, because the UCL claim is
 2 premised on the fact that Defendants unfairly compete through the theft and sale of
 3 intellectual property ***belonging to third parties***. Complaint ¶62. For each of these
 4 reasons, Perfect 10’s UCL claim is not preempted by the Copyright Act. *See, e.g.*,
 5 *Bekaert Progressive Composites Corp. v. Wave Cyber Ltd.*, 2007 WL 1110736 at *3
 6 (S.D. Cal., April 5, 2007) (plaintiff’s UCL claim not preempted by Copyright Act
 7 because plaintiff has pled “elements of wrongdoing in addition to and qualitatively
 8 different from the elements of a Copyright Act claim”). For each of these reasons,
 9 Perfect 10’s UCL claim is not preempted by the Copyright Act.

10 **VI. AT THE VERY LEAST, THIS COURT SHOULD DENY OR**
 11 **CONTINUE THE MOTION UNDER RULE 56(F) TO ALLOW**
 12 **PERFECT 10 TO TAKE DISCOVERY.**

13 Even if this Court is inclined to rule in favor of RapidShare (and it should not,
 14 for all of the reasons discussed above), the Court may not properly grant the Motion.
 15 Together with its opposition papers, Perfect 10 has submitted the Declaration of Eric J.
 16 Benink (the “Benink Declaration”), requesting that the Court deny or continue the
 17 Motion pursuant to Fed. R. Civ. P. 56(f), to allow Perfect 10 to conduct discovery so
 18 that it may present facts essential to justify its opposition to the Motion. As explained
 19 below, this Court is required to apply Rule 56(f) here, because RapidShare filed the
 20 Motion before Perfect 10 was able to conduct any discovery in this action.

21 Rule 56(f) “provides a device for litigants to avoid summary judgment when
 22 they have not had sufficient time to develop affirmative evidence.” *United States v.*
 23 *Kitsap Physicians Serv.*, 314 F.3d 995, 1000 (9th Cir. 2002). “[A] district court should
 24 continue a summary judgment motion upon a good faith showing by affidavit that the
 25 continuance is needed to obtain facts essential to preclude summary judgment.” *State*
 26 *of California v. Campbell*, 138 F.3d 772, 779 (9th Cir.), *cert. denied*, 522 U.S. 822
 27 (1998). Although relief under Rule 56(f) is discretionary, the Supreme Court has
 28 clearly stated that summary judgment must be refused under Rule 56(f) “where the

1 nonmoving party has not had the opportunity to discover information that is essential
 2 to [its] opposition.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986).
 3 See also *Metabolife Int’l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001).

4 Here, RapidShare would not be entitled to summary judgment if it uploaded files
 5 to Rapidshare’s servers itself or otherwise materially contributed to the offending
 6 conduct about which Perfect 10 complains. Accordingly, Perfect 10 at the very least is
 7 entitled to conduct discovery regarding the following essential issues (among others),
 8 which will bolster Perfect 10’s ability to oppose the Motion: (i) whether RapidShare
 9 has uploaded any material to its servers; (ii) the persons or entities that uploaded the
 10 first movies, songs, and other intellectual property onto RapidShare’s servers;
 11 (iii) RapidShare’s relationship with those persons or entities that have uploaded pirated
 12 materials onto RapidShare’s servers; (iv) RapidShare’s use of its “remote upload” tool;
 13 (v) RapidShare’s agreements and relationships with persons and entities it has paid to
 14 upload infringing material; (vi) RapidShare’s agreements and relationships with
 15 websites such as downloadnow.net to which RapidShare sells content; and (vii) the
 16 creation and development of RapidShare’s affiliate program. These and other areas of
 17 discovery to which Perfect 10 is entitled are discussed in greater detail in the Benink
 18 Declaration. Accordingly, this Court must deny the Motion under Rule 56(f) to allow
 19 Perfect 10 to conduct such discovery.

20 **VII. CONCLUSION.**

21 Perfect 10’s UCL and right of publicity claims are not based upon
 22 RapidShare’s acts as a passive storage facility. Nor do these claims seek to treat
 23 RapidShare as the publisher of third-party content. Rather, these claims are based
 24 upon RapidShare’s actions as an “information content provider” when it uploads,
 25 creates, pays for, and sells offending content – actions for which RapidShare is not
 26 entitled to immunity under the CDA. Moreover, Perfect 10’s UCL claim is
 27 premised not on its copyright infringement claim, but on its claim that RapidShare
 28 is unlawfully exploiting the publicity rights and trademark rights of Perfect 10 and

1 the publicity rights, trademark rights, and copyrights of third parties.

2 Accordingly, for all of the foregoing reasons, Perfect 10 respectfully requests
3 that this Court should deny the Motion. Alternatively, this Court at the very least
4 should deny or continue the Motion so that Perfect 10 can conduct discovery necessary
5 to bolster its opposition to the Motion, under Fed. R. Civ. P. 56(f).

6
7 DATED: June 28, 2010

KRAUSE KALFAYAN BENINK & SLAVENS

8
9 By: /s/ Eric J. Benink

10 Eric J. Benink
11 Attorney for Plaintiff Perfect 10, Inc.
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